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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-156 (Sub-No. 25X)

**DELAWARE AND HUDSON RAILWAY COMPANY, INC. DISCONTINUANCE
OF TRackage RIGHTS BETWEEN LANESBORO, PA AND BUFFALO, NY, IN
SUSQUEHANNA COUNTY, PA AND BROOME, TIOGA, CHEMUNG, STEUBEN,
ALLEGANY, LIVINGSTON, WYOMING, ERIE AND GENESEE COUNTIES, NY**

PETITION FOR EXEMPTION

FILED

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Office of Proceedings

OCT 1 2004

TRANSPORTATION BOARD

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Dated: October 1, 2004

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PETITION FOR EXEMPTION

Pursuant to 49 U.S.C. § 10502 and the Board's regulations at 49 C.F.R. § 1121 and § 1152.60, Delaware and Hudson Railway Company, Inc. ("D&H") hereby petitions the Board for an exemption from the prior approval requirements of 49 U.S.C. §§ 10903 *et seq.* to permit D&H to discontinue rail freight operations via trackage rights over approximately 229.55 miles of railroad lines owned and operated by Norfolk Southern Railway Company ("NSR") between Lanesboro, PA and Buffalo, NY. The specific lines proposed for discontinuance by D&H include: (i) NSR's line between Milepost 189.8 ± in Lanesboro, PA and CP Coles at Milepost 210.9 ± in Binghamton, NY; (ii) NSR's Southern Tier line between Milepost 217.0 ± in Binghamton, NY and Milepost 419.8 ± in Buffalo, NY; (iii) NSR's Bison Running Track between the point of connection with the Southern Tier line at MP 419.8 ± and the point of connection with the lines of CSX Transportation, Inc. ("CSXT") at MP 423.3± in Buffalo, NY (including NSR's SK Yard, which D&H currently operates under an agreement between D&H and Consolidated Rail Corporation ("Conrail") dated as of February 1, 1984); and (iv) NSR's Howard Street Running Track between a point of connection with the Bison Running Track at

MP 420.15 \pm and the point of connection with the lines of CSXT at MP 422.3 \pm in Buffalo, NY.¹

The rail lines that are the subject of this Petition are referred to collectively hereinafter as the “Southern Tier Lines.”²

I. STATEMENT OF FACTS

A. The Southern Tier Lines

D&H obtained trackage rights over the Southern Tier Lines in January 1991 in connection with its acquisition of the rail assets of the bankrupt Delaware & Hudson Railway Company (“Old D&H”). See ICC Finance Docket. No. 31700, *Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Ry. Co.*, 7 I.C.C. 2d 95 (1990) (“*CPR/D&H Control*”). As the ICC observed in that proceeding, the transfer to D&H (a newly-formed subsidiary of Canadian Pacific Railway Company (“CPRC”) of Old D&H’s trackage rights – which were originally granted in connection with the Final System Plan that created Conrail – “preserv[ed] D&H’s role as the sole competitor to Conrail in certain areas of the Northeast.” *CPR/D&H Control*, 2 I.C.C. 2d at 117. In particular, D&H provided a competitive alternative to Conrail as a “bridge” carrier for both north-south and east-west traffic. D&H participated as an overhead carrier in traffic moving between the lines of NSR (at Potomac Yard and Buffalo) and CSXT (at Potomac Yard, Philadelphia and Buffalo), on the one hand, and points in New England, on the other hand.

D&H’s trackage rights on the Southern Tier Lines are overhead rights only; D&H does not serve any shipper facilities located on the lines proposed for discontinuance in this Petition. However, pursuant to a Decision issued by the United States Railway Association (“USRA”) on

¹ D&H will retain trackage rights over NSR’s line between Milepost 210.9 \pm and Milepost 217.0 \pm in Binghamton, NY, because D&H requires the use of that segment for ongoing operations in the Binghamton terminal area.

² A map depicting the Southern Tier Lines over which D&H proposes to discontinue trackage rights operations is attached to this Petition as Exhibit 1.

October 4, 1982 (the “*USRA Decision*”) in connection with the Final System Plan, D&H has commercial access to all present and future industries located on the lines formerly operated by Conrail in the “Buffalo Terminal Area” (as defined by USRA). D&H does not physically serve any of the industries to which it was given commercial access under the *USRA Decision*. Rather, D&H delivers cars to (and receives cars from) those Buffalo Terminal Area industries via switching provided by NSR or CSXT (depending upon which portion of the former Conrail’s lines in Buffalo a particular industry is located).

Pursuant to the *USRA Decision*, D&H’s trackage rights on the Southern Tier Lines also permit it to interchange traffic with other railroads whose lines connect with the Southern Tier Lines, and with all rail carriers serving the Buffalo Terminal Area. D&H currently interchanges traffic directly with the following carriers whose lines connect to, or are accessed by D&H via, the Southern Tier Lines:

- Norfolk Southern at SK Yard, Buffalo, NY
- CSXT at Frontier Yard, Buffalo, NY
- Buffalo and Pittsburgh Railroad (“BPRR”) at South Buffalo, NY
- Buffalo Southern Railroad (“BSOR”) at South Buffalo, NY
- South Buffalo Railroad at South Buffalo, NY
- New York & Lake Erie Railroad (“NYLE”) at South Buffalo, NY
- Depew, Lancaster & Western Railroad Co. (MP 415 ± at Depew, NY)
- Rochester & Southern Railroad (“RSR”) (MP 368 ± at Silver Springs, NY)
- Wellsboro & Corning Railroad Company (MP 293 ± at Gang Mills, NY)
- Owego & Hartford Railroad (MP 236 ± at Owego, NY)

B. The Proposed Discontinuance

By this Petition, D&H seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. §§ 10903 *et seq.* to permit it to discontinue rail freight operations over the Southern Tier Lines under its existing trackage rights agreement with NSR. The reasons for the proposed discontinuance are as follows:

In the years since its acquisition of Old D&H's assets, CPRC has made major investments in D&H's track, facilities and equipment. Those investments have improved transit time and service consistency on D&H's network. CPRC also integrated D&H's train service in the Northeast with CPRC's adjacent Canadian operations (as CPRC indicated it would do in the *CPR/D&H Control* proceeding – *CPR/D&H Control*, 7 I.C.C. 2d at 105). Notwithstanding these investments and service improvements, D&H has been unable to achieve sustained profitability. Since 1991, D&H's operating ratio has hovered several points above 100, and D&H has experienced significant negative cash flows (which have been underwritten by CPRC).

A primary cause of D&H's poor economic performance is its limited access to on-line rail traffic. D&H's Final System Plan trackage rights, which represent nearly 40 percent of the total trackage operated by D&H (*see CPR/D&H Control*, 2 I.C.C. 2d at 117), are overhead rights only. Thus, D&H cannot provide local freight service to customers on a substantial portion of its rail system, including the Southern Tier Lines proposed for discontinuance in this Petition. D&H's limited ability to compete for local traffic has made it particularly reliant upon overhead traffic received from, and delivered to, connecting carriers. *See CPR/D&H Control*, 7 I.C.C. 2d at 114 (D&H "highly dependent on receiving and exchanging freight originating on other carriers' lines").

The division of Conrail authorized by the Board in *CSX Corp., et al. and Norfolk Southern Corp., et al. – Control and Operating Leases – Conrail, Inc. et al.*, 3 S.T.B. 196, 387 (1998) ("*Conrail Control*") exacerbated the situation by reducing D&H's historical role as a bridge carrier for both north-south and east-west traffic. The Conrail transaction introduced two vigorous Class I rail competitors (CSXT and NSR) to Northeastern markets that had previously been served exclusively by Conrail (and, to a more limited extent, by D&H). CSXT acquired Conrail's New England lines and its Buffalo-Albany route, enabling CSXT to provide single-line

service to New England via both the Buffalo gateway and the north-south gateways at Potomac Yard and Philadelphia. This eliminated the need for D&H as a bridge carrier for traffic moving between the CSXT system and New England. Likewise, NSR's acquisition of Conrail's Southern Tier line curtailed D&H's participation in NSR east-west traffic between the Buffalo gateway and New England. The handling of such traffic over the Southern Tier between Buffalo and Binghamton, NY was diverted from D&H to NSR, with D&H's role being reduced to that of a bridge carrier between Binghamton and Mechanicville, NY (where D&H's lines connect with the Guilford Rail System ("GTI")). NSR and D&H subsequently entered into an arrangement under which NSR can establish rates to/from GTI at Mechanicville, NY on a single system basis, with D&H handling traffic for the account of NSR on a haulage basis. As a result of these structural changes (and ongoing intense competition from motor carriers), D&H's trackage rights operations on the Southern Tier Lines now consist of only one train per day in each direction.

In light of these developments, CPRC sought to identify ways to improve the efficiency of D&H's operations and enhance its prospects for achieving profitability, while preserving the market reach of the D&H system. As a result of those efforts, D&H and CPRC, on the one hand, and NSR, on the other hand, have entered into several agreements that will enable D&H to discontinue trackage rights operations on the Southern Tier Lines, while retaining commercial access to all customer facilities and interchange points that D&H currently serves via the lines proposed for discontinuance.

First, D&H and NSR have entered into a haulage agreement under which NSR will handle, in NSR's trains, cars for the account of CPRC/D&H (i) between NSR's Bison Yard in Buffalo, NY and D&H's East Binghamton, NY terminal and (ii) between Bison Yard or the East Binghamton terminal, on the one hand, and points of interchange between D&H and all carriers whose lines connect (now or in the future) with the Southern Tier Lines, on the other hand.

Those haulage rights will allow CPRC/D&H to continue to offer through service between CPRC's lines in Ontario and D&H's rail lines beyond Binghamton, NY, and will enable D&H to continue to interchange traffic with all rail carriers located along the Southern Tier Lines.

Second, NSR has agreed to provide switching services to D&H at Bison Yard in Buffalo, NY. Specifically, NSR will switch loaded or empty cars in the revenue waybill account of CPRC/D&H between Bison Yard and the following locations: (i) points of interchange with carriers in the Buffalo Terminal Area that can be accessed directly by NSR; (ii) the point of interchange between D&H and RSR at Silver Springs, NY; and (iii) all industries in the Buffalo Terminal Area to which D&H has commercial access (now or in the future) that can be physically served by NSR. For those cars moving to/from industries or interchange points in the Buffalo Terminal Area that NSR cannot serve directly, NSR will switch the cars to/from CSXT for furtherance to such industries and interchange points. The switching services provided by NSR will preserve D&H's commercial access to all customers in the Buffalo Terminal Area that D&H accesses via switching today. D&H will also retain the ability to interchange traffic with all carriers serving the Buffalo Terminal Area.

Third, NSR has consented to the assignment by D&H to CPRC of D&H's overhead trackage rights on certain NSR lines in the Buffalo area. The trackage rights assigned to CPRC will provide a contiguous route between CPRC's Canadian lines (via certain CSXT lines from the U.S./Canada border over which CPRC already operates) and NSR's Bison Yard. Those trackage rights will allow CPRC to deliver to, and to receive from, NSR at Bison Yard (i) traffic interchanged between CPRC and NSR at Buffalo, NY, (ii) CPRC/D&H through traffic handled by NSR between Buffalo and Binghamton under the D&H-NSR haulage agreement, and (iii) traffic switched by NSR to/from industries and interchanges in the Buffalo Terminal Area pursuant to the D&H-NSR switching agreement. The trackage rights are the subject of a Notice

of Exemption filed concurrently with this Petition by CPRC in Finance Docket No. 34561, *Canadian Pacific Railway Company – Trackage Rights Exemption – Norfolk Southern Railway Company*.

Each of these agreements with NSR may be renewed perpetually by D&H (or, in the case of the Buffalo area trackage rights, by CPRC), subject to the right of either party to seek renegotiation of business terms at periodic intervals (starting in the year 2039).

Collectively, these arrangements will give D&H the same market reach that it has today with trackage rights on the Southern Tier Lines. The D&H-NSR switching agreement preserves D&H's access to every customer in the Buffalo Terminal Area that D&H can access today (or would have the right to access in the future) under the rights granted by the *USRA Decision*. D&H traffic to/from Buffalo Terminal Area industries will be physically handled for D&H's account by NSR and/or CSXT, just as it is today. Thus, no shipper will experience a reduction in the number of rail carriers with competitive access to its facilities as a result of the proposed discontinuance. Likewise, D&H will retain the ability to interchange traffic with every rail carrier with which it interchanges traffic today. The arrangements between D&H and NSR will improve the efficiency of D&H's rail service and enhance D&H's prospects for future profitability, while preserving the competitive options of D&H customers and connecting carriers.

Finally, D&H and NSR have entered into a separate transaction pursuant to which D&H will handle traffic for NSR, under a haulage agreement, between the point of connection between D&H and Canadian National Railway Company ("CN") at Rouses Point, NY, on the one hand, and D&H's Saratoga Yard at Saratoga Springs, NY, on the other hand. D&H has also agreed to grant NSR overhead trackage rights between Saratoga Yard and D&H's East Binghamton terminal (which rights connect with trackage rights already held by NSR over D&H's lines in the

Binghamton area).³ Pursuant to a new switching agreement with NSR, D&H will switch NSR cars, and transfer blocks of cars between NSR trains using those trackage rights, in D&H's East Binghamton terminal. The trackage and haulage rights granted by D&H to NSR will create a substantially shorter route for CN-NSR interline traffic moving between Quebec and the Maritime Provinces, on the one hand, and the Eastern United States, on the other hand, which NSR and CN currently must interchange at Buffalo, NY. These arrangements will benefit D&H by providing a significant new source of bridge traffic (and associated revenue) for its system.⁴

II. ARGUMENT

A rail carrier may not discontinue service via trackage rights unless the Board determines that the public convenience and necessity require or permit it. 49 U.S.C. § 10903(d). However, under 49 U.S.C. § 10502, the Board must exempt a proposed discontinuance from formal regulation under § 10903 when it finds that (1) such regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101, and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a). D&H's proposed discontinuance of trackage rights on the Southern Tier Lines clearly satisfies these criteria for exemption.

A. Regulation Of The Proposed Discontinuance Is Not Necessary To Carry Out The Rail Transportation Policy Of 49 U.S.C. § 10101.

Regulation of the proposed discontinuance is not necessary to carry out any provision of the rail transportation policy set forth at 49 U.S.C. § 10101. The requested exemption will minimize the need for Federal regulatory control over the rail transportation system (§ 10101(2)),

³ The trackage rights are the subject of a Notice of Exemption filed concurrently with this Petition by NSR in Finance Docket No. 34562, *Norfolk Southern Ry. Co. – Trackage Rights Exemption – Delaware and Hudson Ry. Co. Inc.*

⁴ The arrangements between D&H and NSR in the Rouses Point, NY – Binghamton, NY corridor will be implemented as soon as the Notice of Exemption in Finance Docket No. 34562 is effective, and are not dependent upon Board approval of this Petition for Exemption.

and provide for the expeditious handling and resolution of proceedings required or permitted to be brought before the Board (§ 10101(15)). An exemption will also promote a safe and efficient rail system by assisting D&H in its efforts to attain profitability and to earn adequate revenues (49 U.S.C. § 10101(3)). Granting D&H's Petition for Exemption will facilitate the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes of transportation (49 U.S.C. § 10101(4)), by enabling D&H to implement haulage and switching arrangements that improve the efficiency of its operations. Exemption of the proposed discontinuance will foster sound economic conditions in transportation and ensure more effective competition (49 U.S.C. § 10101(5)) by allowing D&H to discontinue financially marginal overhead trackage rights operations, while preserving the competitive options of all customers and connecting carriers to which D&H has commercial access via the Southern Tier Lines today. *See* Docket No. AB-103 (Sub-No. 17X), *The Kansas City Southern Ry. Co. – Abandonment Exemption – In Jackson County, MO* (July 26, 2004) at 2; Docket No. AB-290 (Sub-No. 248X), *Norfolk Southern Ry. Co. – Abandonment Exemption – In Washington County, NC* (July 23, 2004) at 2. Finally, approval of D&H's Petition for Exemption will reduce regulatory barriers to exit (49 U.S.C. § 10101(7)) by minimizing the administrative expense to D&H of obtaining discontinuance authority. *See, e.g.*, Docket No. AB-6 (Sub-No. 409X), *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – In Jefferson, Thayer and Nuckolls Counties, NE* (July 23, 2004) at 2.

Prior decisions of the Board and its predecessor, the ICC, support the conclusion that formal regulation of the proposed discontinuance under the procedures of 49 U.S.C. § 10903 is not warranted. Where trackage rights are overhead rights only and local service is not affected, the Board (and the ICC) have consistently found that formal regulation of a proposed discontinuance is not necessary to carry out the rail transportation policy. *See, e.g.* Docket

No. AB-102 (Sub-No. 25X), *Missouri-Kansas-Texas R. Co. – Exemption – Discontinuance of Trackage Rights in Labette and Cherokee Counties, KS* (February 9, 1990) (“*M-K-T Discontinuance Exemption*”). This is especially true where, as in this case, the carrier discontinuing trackage rights would continue to offer service under a haulage arrangement. See Docket No. AB-6 (Sub-No. 347X), *Burlington Northern R. Co. – Abandonment and Discontinuance of Trackage Rights Exemption – In Greene, Sumter, Choctow, Washington and Mobile Counties, AL* (July 6, 1993) (“*BN Discontinuance in Alabama*”)(detailed scrutiny not required where carrier would continue to market service through a car haulage arrangement); Docket No. AB-6 (Sub-No. 340X), *Burlington Northern R. Co. – Discontinuance of Trackage Rights Exemption – Between East Dubuque, IL and Dubuque, IA* (September 1, 1992) (“*BN Discontinuance in Dubuque*”) (same).

In this case, every shipper to which D&H has commercial access today will continue to have access to D&H service through the haulage and switching services provided to D&H by NSR. Likewise, every connecting carrier that can interchange traffic with D&H today along the Southern Tier Lines or in the Buffalo Terminal Area will continue to be able to interchange traffic with D&H following the proposed discontinuance. The haulage rights and switching services arrangements between D&H and NSR are renewable perpetually (as are the Buffalo area trackage rights granted by NSR to CPRC), so that they provide a long-term alternative to D&H trackage rights operations.

As the ICC observed in Finance Docket No. 30703, *Soo Line R. Co.—Joint Use of Lines—Chesapeake and Ohio Ry. Co.*(August 22, 1986) (“*Soo Joint Use*”) at 9 (emphasis added): “We have long recognized that operating arrangements designed by carriers to promote more efficient or economical operations promote the national [rail] transportation policy and should be encouraged.” Both § 10502 and the rail transportation policy set forth in § 10101

strongly support exemption of the proposed discontinuance of D&H's overhead trackage rights on the Southern Tier Lines from formal scrutiny under the procedures prescribed by § 10903.

B. The Proposed Discontinuance Is Of Limited Scope.

D&H's proposed discontinuance of trackage rights on the Southern Tier Lines is clearly limited in scope, within the meaning of 49 U.S.C. § 10502(a)(2)(A).⁵

D&H's trackage rights on the Southern Tier Lines are overhead rights only. The proposed discontinuance is limited in scope for that reason alone. *See, e.g.,* Finance Docket No. 31088 and Docket No. AB-43 (Sub-No. 148X), *Southern Ry. Co. and Norfolk Southern Corp.—Purchase—Illinois Central R. Co. Line between Fulton, KY and Haleyville, AL—And Trackage Rights—Illinois Central R. Co. Line between Fulton, KY and Centralia, IL*, (May 9, 1988) (discontinuance of overhead trackage rights limited in scope). While D&H seeks to discontinue operations over approximately 230 miles of NSR lines, the length of track involved in a proposed discontinuance is not dispositive of the “limited scope” issue. *See, e.g., BN Discontinuance in Alabama* at 2 (length of line not necessarily dispositive); *Trackage Rights Class Exemption* at 277-278 (length of track involved not relevant to scope of transaction involving overhead rights). The ICC has held that discontinuances of comparable length were limited in scope. *See, e.g., BN Discontinuance in Alabama* at 2 (line abandonment and trackage rights discontinuance totaling 150.72 miles limited in scope); *Norfolk and Western Ry. Co.—Purchase—Illinois Terminal R. Co.*, 363 I.C.C. 882, 895 (1981) (abandonment of overhead trackage rights on five line segments totaling more than 200 miles limited in scope). Of greater relevance to the “limited scope” inquiry are the nature of the services (overhead or local) provided via the subject trackage rights, the number of shippers (if any) that would be adversely

⁵ While the proposed discontinuance satisfies both tests set forth in § 10502(a)(2) – *i.e.*, it is both limited in scope, and does not create the potential for any abuse of market power – the Board need only make one of those two findings in order to exempt the transaction from regulation.

affected by the proposed discontinuance, and the carrier's ability to reroute the traffic of, or otherwise serve, affected shippers. *See, e.g., BN Discontinuance in Alabama* (discontinuance limited in scope where traffic would be handled under a haulage arrangement); Docket No. AB-290 (Sub-No. 2X), *Southern Ry. Co.—Discontinuance of Trackage Rights Operations Between Greenwood and Piedmont, South Carolina*, (June 20, 1990) (transaction limited in scope because shippers would be served by a new carrier); Docket No. AB-290 (Sub-No. 2X), *Southern Ry. Co.—Abandonment and Discontinuance of Operations Exemption—Between Ringgold and Keysville, VA*, (Jan. 27, 1988) (abandonment limited in scope where customers on line to be abandoned would receive service from same carrier via trackage rights on another line).

In the present case, the haulage and switching arrangements that D&H has made with NSR will enable D&H to access customers, and to interchange traffic with other carriers, to the same extent as it does today with its overhead trackage rights on the Southern Tier Lines. In these circumstances, the length of the rail line proposed for discontinuance is not relevant to (much less dispositive of) the “limited scope” issue. Because the discontinuance of D&H's Southern Tier Lines trackage rights will not adversely affect the market reach of D&H, or the rail services available to any shipper or connecting carrier, the Board should find that the proposed discontinuance transaction is of limited scope.

C. Regulation Of The Proposed Discontinuance Is Not Necessary To Protect Shippers From An Abuse Of Market Power.

Even if the Board does not find that the proposed discontinuance satisfies the “limited scope” test of § 10502(a)(2)(A), it must nevertheless grant D&H's Petition for Exemption because regulation of the transaction clearly is not needed to protect any shipper from an abuse of market power.

Railroad Consolidation Procedures—Trackage Rights Exemption, 1 I.C.C.2d 270, 277 (1985) (“*Trackage Rights Class Exemption*”).

The markets served by the Southern Tier Lines are intensely competitive. As a result of the *Conrail Control* transaction, D&H faces direct rail competition from NSR (which owns and operates the Southern Tier Lines) as well as CSXT (which operates a parallel former Conrail route between Buffalo and Albany, NY). The territory served by the Southern Tier Lines also benefits from extensive motor carrier competition. *See CPR/D&H Control*, 7 I.C.C. 2d at 114 (U.S. Northeast is “criss-crossed with one of the densest highway networks in the world”). Accordingly, an abuse of market power by any carrier serving that territory would be impossible (as no carrier possesses market power).

Moreover, the proposed discontinuance will not reduce the number of competitive rail options available to any shipper. D&H will continue actively to market its services to customers who use the Southern Tier Lines. D&H will retain exclusive control over the rates at which its services are offered; NSR will not participate in pricing decisions for D&H services, nor will it be entitled to any line haul revenue in connection with the movement of D&H traffic. Rather, NSR will be compensated for the haulage and switching services it provides to D&H at rates specified in the parties’ agreements.

The haulage and switching arrangements that D&H has made with NSR will enhance D&H’s overall financial viability and competitiveness. D&H estimates that those arrangements (including the separate agreements in the Rouses Point, NY – Binghamton, NY corridor) will generate several million dollars annually in cost savings and additional revenue. A more efficient and financially viable D&H will be better able to compete against carriers of all modes serving the Southern Tier territory, thereby decreasing the risk of an abuse of market power by any carrier. *See Soo Joint Use*, at 8; *Trackage Rights Class Exemption*, 1 I.C.C.2d at 278. Because D&H’s arrangements with NSR are renewable perpetually, D&H is more likely to

remain a viable competitor for the long term than it would be if required to continue marginal trackage rights operations on the Southern Tier Lines.

Accordingly, the proposed discontinuance transaction poses no threat of market power abuse by D&H or any other carrier. *See, e.g.,* Docket No. AB-6 (Sub-No. 302X), *Burlington Northern R. – Trackage Rights Termination and Discontinuance of Operations Exemption – In Tulsa, Wagoner, and Muskogee Counties, OK*, (Dec. 21, 1988) at 2 (regulation not necessary to protect shippers from the abuse of market power where carrier provided overhead service only and all shippers would continue to receive service); *BN Discontinuance in Dubuque* (regulation not necessary to protect shippers from abuse of market power where service would continue under car haulage agreement).

D. Impacts on Employees

The Board may not use its exemption authority to relieve a carrier of its statutory duty to protect the interests of its employees. 49 U.S.C. § 10502(g). D&H anticipates that the Board will impose the employee protective conditions adopted in *Oregon Short Line R.R. and Union Pacific R.R.–Abandonment–Goshen*, 360 I.C.C. 91 (1979), to protect the interests of D&H employees who are adversely affected by the proposed discontinuance.

The proposed discontinuance will affect approximately 25 D&H agreement employees who either hold positions at SK Yard in Buffalo, NY or are based at SK Yard and operate D&H trains over the Southern Tier Lines. The affected positions include eight locomotive engineers, twelve conductors, one carman, two maintenance of way employees, and two yardmasters. Those positions will be abolished.

All of the directly affected D&H agreement employees have seniority under their collective bargaining agreements that will enable them to take positions in their crafts at other D&H locations. Employees who transfer to other locations to take available positions and are

required to relocate their residences will receive relocation benefits in accordance with the *Oregon Short Line* protective conditions. D&H will, of course, serve notice of the discontinuance transaction on the affected employees and their labor unions, and will obtain appropriate implementing agreements as may be required by the protective conditions. D&H has already engaged in preliminary discussions with the unions regarding the proposed discontinuance.

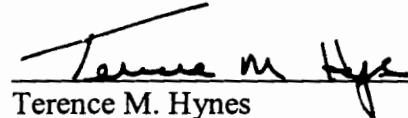
Employees affected by the discontinuance may also benefit from the creation of additional employment opportunities on D&H as a result of D&H's agreements with NSR. For example, D&H plans to add three new locomotive engineer positions and three new conductor positions at Saratoga Springs, NY in connection with the increase in traffic expected to result from the haulage rights granted by D&H to NSR for the movement of NSR-CN interline traffic between Rouses Point and Saratoga Springs, NY.

It is possible that some relatively junior employees at other D&H locations will be unable to hold their current positions as a result of the exercise of seniority by SK Yard employees. The *Oregon Short Line* conditions provide monetary benefits for employees who become "dismissed employees" or "displaced employees" as a result of job abolishments in connection with the implementation of a transaction. D&H also considers it likely that, as a result of normal attrition, additional positions will become available to such employees in the near future.

III. CONCLUSION

For all of the foregoing reasons, D&H respectfully requests that the Board grant it an exemption, pursuant to 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. §§ 10903 *et seq.*, for D&H to discontinue trackage rights operations on the Southern Tier Lines.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terence M. Hynes", is written over a horizontal line.

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VERIFICATION

I, Fred Green, Executive Vice President – Operations and Marketing of Canadian Pacific Railway Company, hereby verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Petition For Exemption. Executed on September 30, 2004.



Fred Green
Executive Vice President
Operations and Marketing

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of October, 2004, I served the foregoing Delaware and Hudson Railway Company, Inc.'s Petition for Exemption by causing a copy thereof to be delivered, via prepaid First Class Mail, to the following parties:

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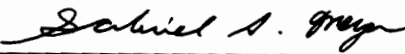
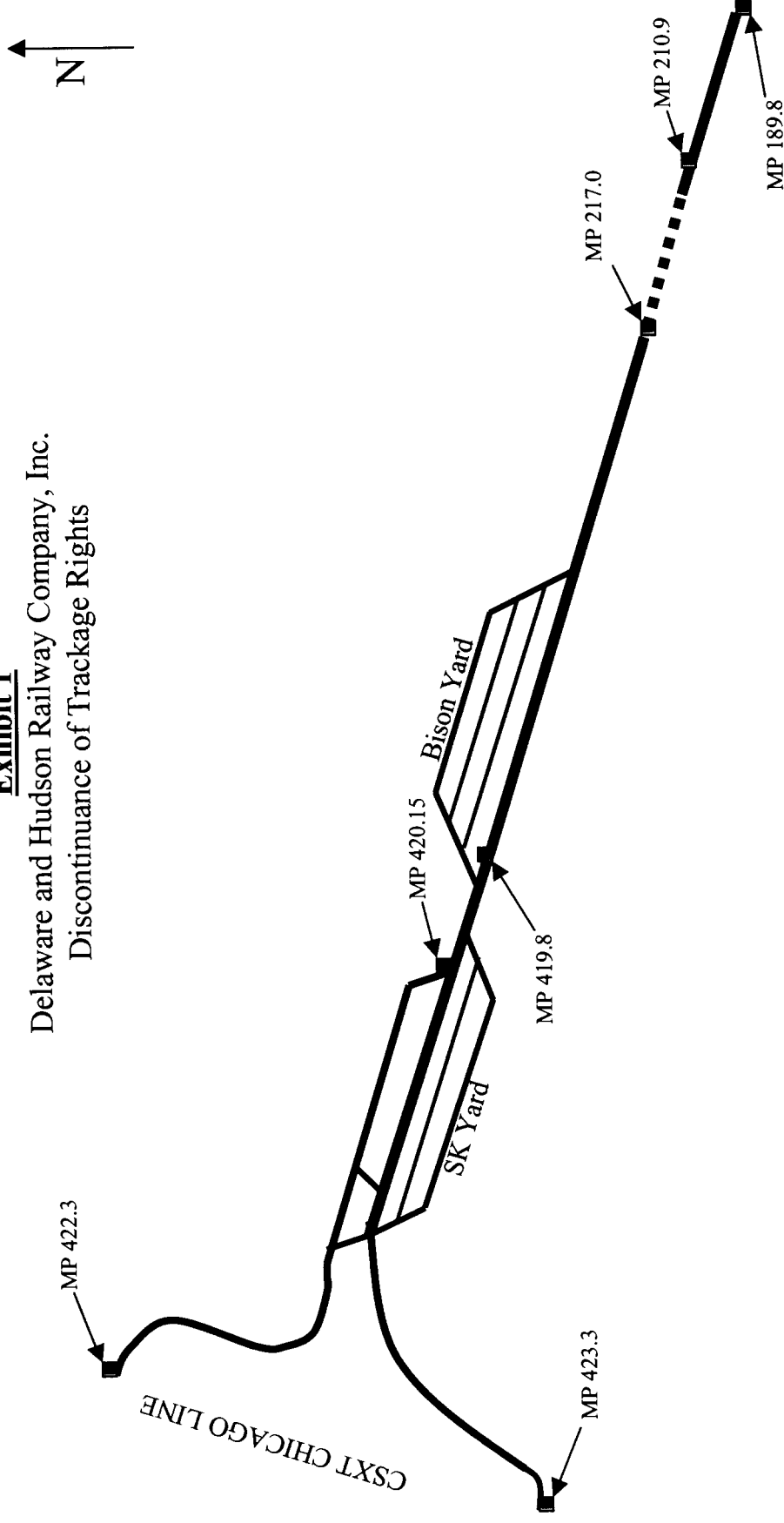

Gabriel S. Meyer

EXHIBIT 1

Exhibit 1

Delaware and Hudson Railway Company, Inc. Discontinuance of Trackage Rights



Description

- Bison Running Track Mile Post MP 423.3 to MP 419.8, including operations in SK & Bison Yards.
- Howard Street Running Track MP 422.3 to 420.15.
- NS Southern Tier Line MP 419.8 at Buffalo to MP 217.0 at Binghamton, NY.
- Trackage Rights retained by D&H in the Binghamton, NY area between MP 217.0 and MP 210.9.
- NS Line between MP 210.9 in Binghamton NY to MP 189.8 in Lanesboro NY.
- Note: All mileposts are designated +/-

Map not to scale

09/24/2004

Created by K.D. Hall